A

Seloga Sdn Bhd v UEM Gynisys Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W– 02–179 OF 2004

B MOHD GHAZALI, SURIYADI AND HASAN LAH JJCA

26 OCTOBER 2007

Civil Procedure — Summary judgment — Determination of questions of law —

C *Plaintiff main contractor and defendant sub-contractor — Employer became insolvent and proposed a scheme of arrangement — Main contractor accepted scheme as full and final settlement — Whether sub-contractor obliged to accept payment in kind as accepted by main contractor — Whether there was a dispute of fact which required viva voce evidence to be determined — Rules of the High Court 1980 O 14A*

D

Contract — Terms — Construction — Plaintiff main contractor and defendant sub-contractor — Employer became insolvent and proposed a scheme of arrangement — Main contractor accepted scheme as full and final settlement — No privity of contract between respondent and employer — Pay when paid clause — Whether sub-contractor

E *was obliged to accept payment in kind as accepted by main contractor*

The appellant/plaintiff was the main contractor of the employer, ie Subang Jaya Hotel Development Sdn Bhd, a wholly owned subsidiary of Faber Group Berhad

F ('the main contract'). The appellant appointed the respondent/defendant as their nominated sub-contractor. Subsequently, the employer became insolvent and was unable to pay its debts when due. The employer, together with Faber Group Berhad and Faber Hotels Holdings Sdn Bhd ('the scheme companies') obtained an order ('the restraining order') restraining their creditors, including the appellant ('the scheme

G creditors') from taking any action or proceeding against the employer and the scheme companies to recover debts owing by them under s 176(10) of the Companies Act 1965 ('the Act'). The employer and the scheme companies consequently proposed a composite scheme of arrangement under s 176(1) of the Act whereby Faber Group Berhad shall issue RM1 nominal amount of irredeemable convertible unsecured loan stock for every RM1 of debt owing to the Scheme Creditors ('the FGB ICULS').

H The FGB ICULS were to be listed on the Kuala Lumpur Stock Exchange. The appellant wrote to its sub-contractors including the respondent to inform them about the said scheme of arrangement. The appellant accepted the FGB ICULS in full and final settlement and discharge of the debt owing by the employer to the appellant for the main contract. The appellant filed an action against the respondent

I praying for a declaration that the appellant was holding the FGB ICULS on behalf of the respondent in full and final settlement of the sub-contract works and an injunction restraining the respondent from filing or proceeding with a petition to wind up the appellant. The respondent applied vide encl 12 under O 14A of the Rules of the High Court 1980 ('the Rules') to dismiss the appellant's suit and the appellant's application for interlocutory injunction (enclosure 3) to restrain the

respondent from proceeding to wind up the appellant. The question to be determined in encl 12 was whether in law and upon a construction of the documents and agreements between the appellant as main contractor and the respondent as the nominated sub-contractor for the said works, the respondent was obliged to accept the form of payment received by the appellant from the employer, which was the FGB ICULS issued pursuant to the said scheme of arrangement instead of cash. The learned judge held that the parties agreed that payment should be in monetary terms and as such the appellant cannot force the respondent to accept the FGB ICULS. He thus allowed the respondent's motion with costs which resulted in the dismissal of the appellant's suit.

Held, dismissing the appeal:

(1) The court was of the view that the respondent's application made pursuant to O 14A of the Rules would be suitable under the circumstances of this case, viz, the question posed by the respondent in encl 12 was such a question that was suitable for determination without the full trial of the action and such determination will finally determine the entire cause or the matter (see para 50).

(2) The pay when paid clause required that payments to the respondent by the appellant was to be made 'within forty five [45] days from the date of receipt by the contractor of any certificate or duplicate copy thereof from the Architect or until receipt of main contract payment from the employer, whichever is later'. The appellant had admitted that it received 'payment' under the main contract from the employer in December 2000, through the said scheme of arrangement in the form of FGB ICULS (see para 58).

(3) From the court's reading, the words 'receipt of main contract payment' must be given its normal meaning. In the court's view, these words simply mean receipt of money and definitely not receipt in kind. The facts showed that the respondent never made any overt or implied gesture to accept payment in kind by way of FGB ICULS. Their letters to the appellant were neither acts of acceptance nor communication of acceptance but were express rejections of a proposed payment in kind (see para 61).

(4) In the instant appeal, the appellant agreed to accept payment from the employer in the form of FGB ICULS. Hence, there was already receipt of payment by the appellant from the employer. It should have been in the form of moneys but the appellant agreed to accept in kind instead as satisfaction of the moneys due and owing to them by the employer. It was not a case where a contractor had not been paid by an employer. The respondent was clearly not a party to the said scheme of arrangement and hence was in turn under no obligation to receive the FGB ICULS in place of monies. The material words in the pay when paid clause were receipt of payment. Those words must be given their normal meaning. The prima facie meaning of receipt of payment is receipt of money (see para 66).

[Bahasa Malaysia summary

Perayu/Plaintif adalah kontraktor utama kepada majikannya, iaitu Subang Jaya Hotel Development Sdn Bhd, sebuah anak syarikat yang dimiliki sepenuhnya oleh Faber Group Berhad ('kontrak utama'). Perayu melantik responden/defendan sebagai subkontraktor yang dilantik. Kemudiannya, majikan tersebut telah menjadi insolven dan tidak dapat membayar hutangnya yang kena dibayar. Majikan tersebut telah bersama-sama Faber Group Berhad dan Faber Hotels Holdings Sdn Bhd ('skim syarikat-syarikat') telah memperoleh satu perintah menghalang pemiutang-pemiutangnya, termasuk perayu ('skim pemiutang-pemiutang') daripada mengambil sebarang tindakan atau prosiding-prosiding terhadap majikan tersebut dan skim syarikat-syarikat untuk mendapat balik hutang-hutang mereka di bawah s 176(10) Akta Syarikat 1965 ('Akta tersebut'). Majikan dan skim syarikat-syarikat telah berikutan itu menawar satu skim penyusunan komposit di bawah s 176(1) Akta tersebut di mana Faber Group Berhad akan mengeluarkan amaun nominal RM1 stok pinjaman tidak bercagar yang boleh ditukarkan dan tidak boleh ditebus bagi setiap RM1 hutang yang kena di bayar kepada skim pemiutang-pemiutang ('FGB ICULS tersebut'). FGB ICULS tersebut akan disenaraikan di Bursa Saham Kuala Lumpur. Perayu telah menulis kepada sub-kontraktor-sub-kontraktornya termasuk responden untuk memaklumkan kepada mereka skim penyusunan tersebut. Perayu telah menerima FGB ICULS tersebut sebagai penyelesaian penuh dan muktamad pelepasan penuh hutang yang kena dibayar oleh majikan tersebut kepada perayu untuk kontrak utama tersebut. Perayu telah memfailkan satu tindakan terhadap responden memohon satu deklarasi bahawa perayu memegang FGB ICULS bagi pihak responden sebagai penyelesaian penuh dan muktamad untuk kerja-kerja sub-kontrak dan menghalang responden daripada memfailkan atau memulakan satu petisyen untuk menggulung perayu. Responden memohon melalui kandungan 12 di bawah A 14A Kaedah-kaedah Mahkamah Tinggi 1980 ('Kaedah tersebut') untuk menolak tindakan perayu dan permohonan perayu untuk injunksi interlokutori (kandungan 3) untuk menghalang responden daripada memulakan prosiding menggulungkannya. Soal yang perlu diputuskan di kandungan 12 ialah sama ada mengikut undang-undang dan atas pentafsiran dokumen-dokumen dan perjanjian-perjanjian di antara perayu sebagai kontraktor utama dan responden sebagai sub-kontraktor yang dilantik untuk kerja-kerja tersebut, responden wajib untuk menerima bayaran yang diterima oleh perayu daripada majikan tersebut, iaitu FGB ICULS yang dikeluarkan tersebut mengikut skim penyusunan tersebut dan bukannya wang. Hakim mahkamah yang bijaksana telah memutuskan bahawa pihak-pihak telah bersetuju bahawa bayaran harus dalam bentuk wang dan dengan itu perayu tidak boleh memaksa responden untuk menerima FGB ICULS tersebut. Dengan itu, beliau membenarkan usul responden dengan kos yang menyebabkan tindakan perayu ditolak.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah berpendapat bahawa permohonan perayu yang dibuat mengikut A 14A Kaedah tersebut adalah sesuai dalam keadaan kes ini, iaitu soalan yang dibangkitkan oleh responden di kandungan 12 adalah soalan sebegini yang

sesuai untuk diputuskan tanpa perbicaraan penuh tindakan tersebut dan keputusan ini akan memutuskan dengan muktamad keseluruhan kausa atau perkara tersebut (lihat perenggan 50).

(2) Klausa bayar selepas dibayar memerlukan bayaran kepada responden oleh perayu dilakukan 'within forty five [45] days from the date of receipt by the contractor of any certificate or duplicate copy thereof from the Architect or until receipt of main contract payment from the employer, whichever is later'. Perayu telah mengaku bahawa ia telah menerima 'bayaran' di bawah kontrak utama daripada majikan tersebut pada Disember 2000, melalui skim penyusunan dalam bentuk FGB ICULS (lihat perenggan 58).

(3) Daripada pemahaman mahkamah, perkataan 'receipt of main contract payment' harus diberi maksudnya yang biasa. Pada pandangan mahkamah, perkataan-perkataan ini bermaksud penerimaan dalam bentuk wang dan bukannya bentuk lain. Fakta-fakta menunjukkan bahawa responden tidak pernah melalui tindakan-tindakannya secara terang atau tersirat menerima bayaran yang berlainan melalui FGB ICULS. Surat-surat mereka kepada perayu bukannya tindakan menerima ataupun memaklumkan penerimaan tetapi merupakan ketidakmenerimaan mereka akan bayaran secara berlainan (lihat perenggan 61).

(4) Dalam rayuan ini, perayu bersetuju untuk menerima bayaran daripada majikan tersebut dalam bentuk FGB ICULS. Dengan itu, terdapat penerimaan bayaran oleh perayu daripada majikan tersebut. Ia sepatutnya dalam bentuk wang tetapi perayu bersetuju untuk menerimanya dalam bentuk yang lain untuk menyelesaikan wang-wang yang dihutangkan kepada mereka oleh majikan tersebut. Ia bukannya satu kes di mana kontraktor tidak dibayar langsung oleh majikannya. Responden dengan jelas bukannya pihak kepada skim penyusunan dan dengan itu tidak di bawah sebarang kewajipan untuk menerima FGB ICULS menggantikan wang. Perkataan yang penting dalam klausa bayar apabila dibayar adalah penerimaan bayaran. Perkataan-perkataan tersebut harus diberi makna yang biasa. Pada dasarnya maksud penerimaan bayaran ialah penerimaan wang (lihat perenggan 66).]

Notes

For cases on determination of questions of law, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7243–7245.

For cases on construction of terms of contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5251–5295.

Cases referred to

Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd [1988] 1 MLJ 500 (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd [1998] 1 SLR 694 (refd)

Kerajaan Negeri Terengganu v Petroliam Nasional Bhd & Anor [2003] 1 MLJ 260 (refd)

Legislation referred to
Companies Act 1965 ss 176, 218
Rules of the High Court 1980 O 14A

Appeal from: Suit No D7–22–50 of 2003 (High Court, Kuala Lumpur)

William JK Leong (Henry Lean Sze Yau with him) (William Leong & Co) for the appellant.
Sulaiman Abdullah (Syamsuriatina Ishak with him) (Shahriza Shukor & Co) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned High Court judge made pursuant to the respondent's motion (encl 12) under O 14A of the Rules of the High Court 1980 ('the Rules') to dismiss the appellant's suit and the appellant's application for interlocutory injunction (encl 3) to restrain the respondent from proceeding to wind up the appellant. Enclosure 12 was allowed with costs and encl 3 was dismissed with costs.

[2] We dismissed the appeal against both enclosures and we hereby give our reasons for doing so.

THE BACKGROUND

[3] The appellant (the plaintiff in the court below) carries on business as a general contractor and was the main contractor for a project known as 'The Proposed Renovation and Extension to the Merlin Subang ('the main contract').

[4] The respondent (the defendant in the court below) carries on business as a contractor in air-conditioning and mechanical ventilation equipment and services and was a nominated sub-contractor for the main contract.

[5] The 'Employer' for the main contract is Subang Jaya Hotel Development Sdn Bhd ('the employer'), a wholly owned subsidiary of Faber Group Berhad.

[6] By letter dated 14 November 1994 Juaraconsult Sdn Bhd, acting upon instructions of the employer, informed the appellant that the employer has selected the respondent to be the nominated sub-contractor for Phase 2 of the main contract for a tender sum of RM2,593,862. The second paragraph of that letter reads:

> In accordance with the condition of contract entered between yourselves and Messrs Subang Jaya Hotel Development Sdn Bhd, you are hereby instructed to accept the tender submitted by Messrs UEM Genisys Sdn Bhd and the said tenderer is hereby declared to be the Subcontractor employed by you and shall be referred to as the 'Nominated Sub-Contractor.

[7] Consequently by letter dated 30 November 1994 and intituled 'PROPOSED RENOVATION AND EXTENSION TO THE MERLIN SUBANG (PHASE 2) — Air-Conditioning & Mechanical Ventilation Services', the appellant informed the respondent that 'you have been accepted as our Nominated Sub-Contractor' subject to the following terms and conditions. Clauses 10, 11 and 12 of that letter reads:

> 10. You have agreed that payments will be made to you within Forty Five [45] days from the date of the receipt by the contractor of any certificate of duplicate copy thereof from the Architect or until receipt of main contract payment from the Employer, whichever is later.
>
> 11. In the event of any inconsistency between the terms of this Letter of Acceptance and the terms of the formal sub-contract to be entered into between you and us, the terms of this Letter of Acceptance shall prevail.
>
> 12. Until a formal sub-contract is executed, this Letter and your confirmation of acceptance hereof will be a binding sub-contract between you and us as the Main Contractor.

[8] The respondent acknowledged receipt of the above letter and made an endorsement on that letter which read as follows:

> We, the undersigned, hereby acknowledge receipt of the above Letter of Acceptance, a copy of which has been retained by us, and confirm that all the terms and conditions and stipulations are fully agreed to by us.

[9] By letter dated 11 March 1996 the appellant informed the respondent that they have been accepted as the appellant's nominated sub-contractor for an additional piece of work, namely, 'Supply and Installation of Kitchen Equipment' which also fell under Phase 2 for the contract sum of RM1,060,000. The terms and conditions contained therein were similar to that as contained in the letter dated 30 November 1994 referred to above, especially clauses 10, 11 and 12 (hereafter referred to collectively as 'the sub-contracts').

[10] The formal sub-contract was later executed on 27 July 1996.

[11] Subsequently, the employer became insolvent and was unable to pay its debts when due. On or about 13 October 1999 the employer, together with Faber Group Berhad and Faber Hotels Holdings Sdn Bhd ('the Scheme Companies') obtained an order ('the restraining order') restraining their creditors, including the appellant ('the Scheme Creditors') from taking any action or proceeding against the employer and the Scheme Companies to recover debts owing by them under s 176(10) of the Companies Act 1965 ('the Act').

[12] The employer and the Scheme Companies consequently proposed a composite scheme of arrangement under section 176(1) of the Act ('the said scheme of arrangement') whereby Faber Group Berhad shall issue RM1 nominal amount of irredeemable convertible unsecured loan stock for every RM1 of debt owing to the Scheme Creditors ('the FGB ICULS'). The FGB ICULS were to be listed on the Kuala Lumpur Stock Exchange ('the KLSE').

[13] By letter dated 17 November 1999, the appellant wrote to its sub-contractors including the respondent to inform them about the said scheme of arrangement. That letter read as follows:

> Dear Sirs,
>
> EXTENSION AND RENOVATION WORKS TO THE MERLIN SUBANG (PHASE II)
>
> We are writing to inform you that we have been recently advised by Faber's solicitor that they have obtained an order pursuant to Section 176 of the Companies Act 1965 and that they will be convening a meeting to have their Composite Scheme of Arrangement (CSA) approved with or without modifications.
>
> The payment terms between you and us are conditional upon Faber fulfilling their payment to us. They via the Order have for now prevented us from receiving any payment except in the form of their Composite Scheme of Arrangement if approved.
>
> Strictly without prejudice to our rights and remedies in the event the Composite Scheme of Arrangement is approved (with or without modifications), we propose to settle any moneys payable to you in a similar form, manner and proportion as the moneys payable to us are settled under the said Composite Scheme of Arrangement. Kindly let us have your comments, if any, to our proposal by 20th November 1999, failing which we shall proceed accordingly on the basis that you are agreeable to our proposal and vote in favour of the said Composite Scheme of Arrangement (with or without modifications). We attached herewith the relevant section of the Composite Scheme of Arrangement for your perusal and consideration but should you require further and better particulars, please arrange to see us at our office for the Explanatory Statement.
>
> Thank you. Yours faithfully, SELOGA JAYA SDN BHD

[14] The respondent replied by letter dated 19 November 1999 which read, inter alia, as follows:

> We regret to inform that *we are unable to accept the settlement proposal* as stipulated in your aforesaid letter.
>
> We hereby reserve all our rights at law and under the above subcontracts.
>
> (Emphasis added.)

[15] The said scheme of arrangement was approved by the statutory majority of the Scheme Creditors (which included the appellant) at a court convened creditors meeting held on 22 November 1999 and sanctioned by the High Court in accordance with the provisions of s 176 of the Act.

[16] The employer's part of the said scheme of arrangement was known as Scheme F and under that scheme, Faber Group Berhad purchased the employer's debts from the creditors to be satisfied by the issuance of the FGB ICULS. The appellant accepted the FGB ICULS in full and final settlement and discharge of the debt owing by the employer to the appellant for the main contract which included 1,386,646 FGB ICULS in respect of the sub-contract works carried out by the respondent.

[17] By letter dated 11 December 2000 the appellant wrote to the respondent as follows:

EXTENSION AND RENOVATION WORKS TO THE MERLIN SUBANG (PHASE II) Kitchen Equipment

We have been informed that Faber's Composite Scheme of Arrangement has been approved and that the ICULS will be issued shortly in settlement of the moneys owing to us. To enable us to arrange the transfer of 219,425 units of ICULS to you as full and final settlement of the moneys owing to you, we would be obliged if you could kindly let us have your CDS Account Number by 21st December 2000 failing which we shall hold your portion of the ICULS in our CDS account until further notice from you.

Attached a copy of the CDS account form for your completion and return to us by 21st December 2000.

[18] By letter dated 16 December 2000 to the appellant, the respondent replied as follows:

1. Please refer to your letter of 11 Dec 00.

We are unable consider your proposal without knowing the number of ICULS that you propose to transfer and the basis of such number. We would appreciate if you can provide such information including the Final Certificates in respect of the sub-contracts entered into between the parties.

Your prompt response would be appreciated in view of your suggested deadline of 21 Dec 2000.

(Emphasis added.)

[19] On 30 December 2000, the appellant issued two debit notes to the respondent ('the said debit notes') the details of which are as follows:

1st Debit Note:

QTY	RATE(RM)	AMOUNT (RM)
Being 219,425 units of Faber ICULS 2000/2005 hold on your behalf as full settlement of RM219,425.43 due to you under The Merlin Subang project (Phase 2)	Lump Sum	219,425.43

2nd Debit Note:

QTY	RATE(RM)	AMOUNT (RM)
Being 1,167,221 units of Faber ICULS 2000/2005 hold on your behalf as full settlement of RM1,167,221.41 due to you under The Merlin Subang project (Phase 2).	Lump Sum	1,167,221.41

[20] Approximately two years later, by covering letter dated 17 December 2002 addressed to the appellant, the respondent's solicitors served a copy of a notice pursuant to s 218 of the Act; it read:

NOTICE PURSUANT TO SECTION 218 OF THE COMPANIES ACT, 1965

TO:- SELOGA JAYA SDN BHD BY HAND

Wisma Seloga, No 1,

Jalan USJ 10/1 A,

Uep Subang Jaya, 47620

Petaling Jaya Selangor Darul Ehsan

Dear Sirs,

OUTSTANDING SUM OF RM1,386.646.84 DUE AND OWING TO UEM GENISYS SDN BHD FOR EXTENSION AND RENOVATION WORKS TO THE MERLIN SUBANG (PHASE II).

TAKE NOTICE that we. Messrs Gideon Tan Razali Zaini of 812, 8th Floor, Block A, Kelana Square, 17, Jalan SS7/26. 47301 Petaling Jaya, Selangor Darul Ehsan, solicitors for UEM Genisys Sdn Bhd whose business address is at Tingkat 16, Menara 2, Faber Towers, Jalan Desa Bahagia. Taman Desa, 58100 Kuala Lumpur, do hereby require you within twenty one (21) days from the date of the service of this Notice on you, to pay, either to us as solicitors or to our client, the sum of Ringgit Malaysia One Million Three Hundred and Eighty Six Thousand Six Hundred and Forty Six and Cents Four (1,386,646.84) being the sum due and owing for the extension and renovation works as at 11 November 2002, the sum of which was admitted by you vide your letter to our client on 11 November 2002, and secure or compound the said sum to our clients' reasonable satisfaction.

At the expiration of twenty-one (21) days from the date of service of this Notice and upon your failure to pay, secure or compound the said sum demanded to our clients reasonable satisfaction, you will pursuant to Section 218(2)(a) of the Companies Act 1965 be deemed unable to pay your debts as and when they fall due, proceedings may thereafter be commenced for the winding up of Seloga Jaya Sdn Bhd.

Dated this 17th day of December 2002.

[21] By letter dated 26 December 2002 the appellant's solicitors responded to the respondent's notice under section 218 of the Act as follows:

Notice Under Section 218 Companies Act 1965 dated 17th December 2002 ('the said Notice') for RM1,386,646,84 ('the said Sum')

We refer to the above wherein we act for Seloga Jaya Sdn Bhd.

We also refer to the said Notice and are instructed by our client as follows:

1. Our client denies that our client is indebted to your client for the said Sum.

2. Our client denies that by their letter dated 11.11.2002 to your client ('the said Letter') our client had admitted that the said Sum was due and owing from our client to yours. The said Letter was written on a strictly without prejudice basis and the contents therein are privileged. Our client objects to the use of the said Letter or any of the contents therein by your client. The said Notice is therefore void and of no effect.

3. Without prejudice to our client's right to object to the use of the said Letter our client instructs that the said Letter is not an admission that the said Sum is due and owing from our client to yours. The said Letter was clearly a confirmation of an earlier settlement agreement entered into between our client and yours whereby your client as the sub-contractor had accepted 1,386,646 units of Faber ICULS issued on or around 30th December 2000 as full and final settlement for work done in connection with the 'Extension and Renovation Works to Merlin Subang (Phase II)' ('the said Project') from our

client, particulars of which are within your client's knowledge. The said Letter was to request for your client's CDS Account number to effect the transfer of the said Faber ICULS to your client's name.

4. In the circumstances, the demand in the said Notice cannot be sustained and is without merit.

We are instructed by our client to demand which we hereby do that your client withdraw the said Notice within seven (7) days from the date hereof and to give us your client's undertaking not to proceed with any winding up proceedings, presentation of winding up petition and/or not to advertise any notice of winding up proceedings against our client, failing which, our client's instruction is to apply to court for an injunction to restrain your client from so proceeding, in which event our client shall be claiming for damages, costs and expenses.

THE SUIT

[22] On 9 January 2003, the appellant filed this action against the respondent praying for the following reliefs:

(a) a declaration that the appellant is holding the said 1,386,646 FGB ICULS on behalf of the respondent in full and final settlement of the sub-contract works;

(b) an injunction restraining the respondent by itself, its servants or agents or otherwise from filing or proceeding with a petition to wind up the appellant or to advertise or publish the winding-up petition;

(c) damages;

(d) costs; and

(e) such further and other relief as the court deems fit to order.

[23] The main thrust of the appellant's case as gleaned from its statement of claim was that in relation to the sub-contracts, it was a term of the first sub-contract for the 'Air Conditioning and Mechanical Works', ie, clause 10 of the letter of appointment dated 30 November 1994, that payments for the works will be made within 45 days from the date of receipt by the appellant of any certificate from the architect or until receipt of the main contract payment from the employer whichever is later and that the subsequent sub-contract, namely, for the 'Supply and Installation of Kitchen Equipment' was on similar terms as evidenced by the letter of appointment dated 11 March 1996 with clause 10 thereof being identical to clause 10 of the first sub-contract and that by reason of the said identical clause 10 (hereafter referred to collectively as the 'pay when paid clause') and upon a proper construction thereof, including taking into consideration its purpose, intent and factual matrix relating thereto, the respondent is bound to accept the said FGB ICULS as full and final settlement of the works done for the sub-contracts.

[24] According to the appellant, the factual matrix are, inter alia, as follows:

(a) by reason of the respondent being an associate company of the employer, the employer required that the respondent be appointed as a nominated sub-contractor for the sub-contracts;

(b) the respondent was aware or ought to have been aware of the financial position of the employer and accepted the risk of non-payment or payment otherwise than in cash by the employer for works done under the sub-contracts due to its insolvency;

(c) the appellant as the main contractor did not agree and was not willing to accept the risk of non-payment, insolvency or payment otherwise than in cash by the employer for works done by nominated sub-contractors; and

(d) for the above reasons and for all practical purposes and intent, the appellant and the respondent proceeded as a joint venture with the respondent taking the risk of sub-contract works and the appellant, the non-nominated sub-contract works and therefore agreed to the 'pay when paid clause'.

[25] In relation to the said debit notes that it issued, the appellant averred that it was expressly stated therein that the appellant was holding the 1,386,646 FGB ICULS on behalf of the respondent in full settlement of the sub-contract works and that at all material times it was ready willing and able to transfer the same into the central depository account ('CDS account') of the respondent.

[26] Further and in the alternative, the respondent agreed to accept the FGB ICULS in full and final settlement of the sub-contract works and that agreement was made partly in writing, namely, by correspondence and the said debit notes and partly by conduct, consisting of or is to be inferred from the following:

(a) the respondent with full knowledge that the appellant was holding the FGB ICULS on behalf of the respondent in full and final settlement

(i) retained the said debit notes without in any way dissenting from or objecting to them within a reasonable time;

(ii) retained the appellant's letter of 15 January 2001 wherein the appellant made the declaration of trust that the FGB ICULS were held on behalf of the respondent without in any way dissenting from or objecting to them within a reasonable time; that letter, which were sent to several companies as 'per distribution list' which included the respondent, read as follows:

> Date: 15 January 2001 Per Distribution List
>
> FABER BERHAD'S ICULS
>
> We refer to our letters to you dated 11th/12th December 2000.
>
> We have been advised that under the existing KLSE regulations, we are unable to effect the transfer of your portion of the Faber ICULS into your name unless through an actual transaction done through a stock broking firm. However, this problem can be overcome by way of a married due (sic) if both the vendor and purchaser maintain accounts with the same broking firm.
>
> Faber lCULS allocated to Seloga Jaya Sdn Bhd is currently registered under our CDS Account at TA Securities Berhad. We would appreciate you could open an account with TA Securities Berhad by completing the attached account opening form and returning to us for our onwards submission to TA Securities Berhad. For those who already have an account with TA Securities Berhad, kindly furnish us your CDS Account No. with TA Securities Berhad.

> Kindly let us for your duly completed form/reply by 10 February 2001, failing which we will assume that you are not interested in transferring your portion of the Faber ICULS in trust into your own name and we shall continue to hold your Faber ICULS in trust until further instruction from you.
>
> Meanwhile, we are pleased to enclose herewith our Debit Note being full settlement of the amount due to you under the Merlin Subang (Phase II) Project.
>
> Thank you for your cooperation.
>
> Your faithfully SELOGA JAYA SDN BHD

(b) by the respondent's silence and conduct with full knowledge that the appellant will hold the FGB ICULS in trust for the respondent and will not sell or deal with them, permitted and induced the appellant to believe that the respondent has agreed to accept the FGB ICULS in settlement; and

(c) in reliance thereto, the appellant did not sell the FGB ICULS issued at RM1 each upon its listing on the KLSE and have continued to hold the same in trust for the respondent for more than two years during which time the price of the FGB ICULS traded on the KLSE have fallen to RM0.10 each.

[27] Further and in the alternative, the respondent is estopped from denying that it agreed to accept the FGB ICULS by reason of its conduct wherein by its silence permitted and induced the appellant to believe that it accepted the FGB ICULS in settlement and have thereby caused the appellant to suffer grave prejudice, detriment and damage by not selling the FGB ICULS because the price have fallen substantially during these two years.

[28] It is also the appellant's contention that the respondent's notice under section 218 of the Act is unlawful, improper, a legal wrong and/or ought to be estopped. In relation to this the appellant argued that the respondent, in issuing the notice under section 218 of the Act and making the threat to wind up the appellant acted in bad faith and committed an abuse of the civil process with the ulterior motive of damaging the appellant's business rather than furthering any legitimate interest of the respondent and/or without reasonable and just cause; these wrongful acts of the respondent will cause irreparable damage to the appellant unless restrained by the court.

THE DEFENCE

[29] In its statement of defence, the respondent state that it was nominated by the employer pursuant to the main contract and the appellant had accepted such nomination.

[30] In relation to the pay when paid clause in the sub-contracts, the respondent contend that it was clearly stipulated that payments to the respondent by the appellant are to be made 'within Forty Five [45] days from the date of the receipt by

A the contractor of any certificate or duplicate copy thereof from the Architect or until receipt of main contract payment from the Employer, whichever is later'.

[31] The respondent state that the appellant sent some selective information about the said scheme of arrangement but pointed out that the respondent was not a
B Scheme Creditor under the restraining order or under the said scheme of arrangement proposed by the Scheme Companies which resulted in the issuance of the FGB ICULS. Further, there are no terms in the sub-contracts or other documents which bind the respondent to accept the 1,386,646 FGB ICULS as full and final settlement of the appellant's debt of RM1,386,646.84 to the respondent for the sub-contracts.

C

[32] The said scheme of arrangement only concerns the employer's debts to the appellant and not the appellant's own debts. There is no basis whatsoever to show that the respondent was required to accept the FGB ICULS in lieu of monetary payment as full and final settlement of the appellant's debt.

D

[33] Both the respondent and the employer are separate legal entities and are not associated. The respondent's sub-contracts involved the appellant and not the employer.

E **[34]** The respondent has no knowledge of the terms of the contract binding the employer and the appellant. The respondent was not involved in nor privy to the contract entered into between the employer and the appellant.

[35] The appellant has no right to unilaterally impose the manner of settling the
F appellant's debt to the respondent because the respondent has never agreed that it would accept the FGB ICULS as full and final settlement of the appellant's debt.

[36] It is actually the appellant which has failed and/or was incapable and/or neglected to settle the appellant's debt and is now attempting to make all kinds of
G baseless claims in order to avoid paying the debt. As such, it is the appellant which ought to be estopped from making unilateral changes to the terms of the sub-contracts, more so since the main contract had ended as long ago as May 1997.

[37] The appellant had, unilaterally and without the permission or agreement of
H the respondent, attempted to transfer the FGB ICULS to the respondent as settlement of the appellant's debt.

[38] The appellant is put on strict proof to prove the existence of an agreement between the appellant and the respondent for the respondent to accept the FGB ICULS as full and final settlement of the appellant's debt. On the contrary, the
I respondent asserts that it has, since 19 November 1999, rejected the appellant's offer of settling the appellant's debt in the form of these FGB ICULS.

[39] The respondent ought not to be estopped from enforcing its right to claim the appellant's debts in the form of monies.

[40] The respondent is entitled in law and in contract to demand for the amount owing and admitted by the appellant through a notice pursuant to s 218 of the Act. As a direct consequence of non-payment thereof, the respondent is further entitled to commence the process of winding-up against the appellant.

APPLICATION FOR INJUNCTION (ENCL 3)

[41] On 9 January 2003, the appellant filed a summons-in-chambers and applied for an injunction to restrain and prohibit the respondent from filing or proceeding with a petition to wind up the appellant or to advertise or publish the winding up petition on, inter alia, the following grounds:

(a) the notice issued under section 218 of the Act was not issued under a judgment debt made in favour of the respondent against the appellant and there are substantial and bona fide disputes on the alleged debt;

(b) the said notice and the intention of proceeding with the winding-up were made for the purpose of putting unlawful, improper and illegitimate pressure and an extortion;

(c) there are serious issues to be tried as to whether the respondent as a nominated sub-contractor is contractually bound by the pay when paid clause to accept the FGB ICULS issued by the employer in settlement of the respondent's portion of the sub-contract works, whether the respondent has agreed to accept the FGB ICULS in settlement and whether the respondent is estopped by its conduct from denying that it accepted the FGB ICULS in settlement;

(d) if a winding-up petition is presented and/or advertised the appellant will suffer irreparable damage; its credit and reputation will be adversely affected and cannot be compensated by damages; and

(e) the balance of convenience lies squarely in favour of granting the injunction for all of the reasons set out above.

APPLICATION UNDER O 14A RULES OF THE HIGH COURT (ENCL 12)

[42] On 15 July 2003 the respondent filed an application pursuant to O 14A of the rules moving the court for, inter alia, the following orders:

(i) that the Court determines the question of law and/or construes the documents and agreements between the appellant and the respondent the question or issue of whether the respondent is obliged to accept the form of payment received by the appellant from the employer in respect of the sub-contract works, i.e., in the form of FGB ICULS, instead of monies, in full and final settlement of the appellant's outstanding debt to the respondent in the amount of RM1,386,646.84 for the same ('the appellant's debt');

(ii) that upon such determination under prayer (i) above, the appellant's suit herein be dismissed.

[43] The grounds of the application canvassed by the respondent for such relief are as follows:

(i) that the pay when paid clause in the sub-contracts require that payments to the respondent by the appellant is to be made 'within Forty Five [45] days from the date of the receipt by the contractor of any certificate or duplicate copy thereof from the Architect or *until receipt of main contract payment from the Employer, whichever is later*; (Emphasis added.)

(ii) that the appellant has admitted that it had received payment for the main contract from the employer on or around December 2000, through the said scheme of arrangement, in the form of FGB ICULS;

(iii) that the appellant alleged that the respondent is obliged to accept the 1,386,646 FGB ICULS in turn, as full and final settlement of the appellant's debt whereas the respondent maintains that such payments must be made as how the previous forms of payments to the respondent has always been, that is, in the form of cash; further there is no obligation on the respondent's part to accept payment in the form of the said FGB ICULS even if the appellant itself had elected to accept the same from the employer;

(iv) the determination of the question or issue of whether the respondent is obliged to accept the FGB ICULS instead of monies as full and final settlement of the appellant's debt will finally determine all the issues in the appellant's entire suit filed herein;

(v) the determination of this question or issue may be justly, expeditiously and conveniently reached by an examination and construction of documents and agreements between the parties without the need for a full trial; and

(vi) the expeditious disposal as stated in paragraph (v) above will save time on part of this Court and the parties as well as the legal costs.

JUDGMENT OF THE HIGH COURT

[44] The learned High Court judge heard both applications together and dismissed the appellant's application for interlocutory injunction with costs (encl 3) and allowed the respondent's motion (encl 12) and upon that determination the appellant's suit was dismissed with costs. The appellant appealed.

[45] In his grounds of judgment the learned judge ruled as follows:

> An examination of the applicable documents before the effecting of the section 176 composite scheme of arrangement showed that the parties intended all payments to be in monetary terms. The defendant was not involved in that scheme. The plaintiff variously attempted to get the defendant to accept the FGB ICULS as payment but failed to do so. In the circumstances there was no agreement between the parties to vary the terms of the contract entered into between them to make it incumbent upon the defendant to accept the FGB ICULS as payment for the money owed to it.
>
> As there was no dispute that the plaintiff had been paid by the employer, it followed that the plaintiff had to pay the defendant for the work done by virtue of the pay-when-paid clause as per the agreement which bound them both. As the agreement referred to payment

in monetary terms, the plaintiff could not force the defendant to accept payment by way of the FGB ICULS. In these circumstances, I agreed with the submissions of the learned counsel for the defendant and allowed the application in enclosure (12) as prayed for and consequentially dismissed enclosure (3) with costs.

[46] Order 14A of the rules intituled 'Disposal of case on point of law' reads:

1. Determination of questions of law or construction.

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19, or any other provision of these rules.

2. Manner in which applications under rule 1 may be made.

An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

THE APPEAL

[47] Before us, the appellant canvassed several grounds of appeal. In relation to the motion pursuant to Order 14A of the rules (encl 12), the grounds, inter alia, are as follows:

(a) judge failed to consider and hold that —

(i) there was a dispute of fact as to whether the appellant and the respondent's representatives had in various discussions agreed to the settlement of the sub-contract works by way of 1,386,646 FGB ICULS which required viva voce evidence to be determined;

(ii) the respondent had contracted with the employer to perform the sub-contract works and receive payment from the employer within 45 days upon receipt of Architect's Certificate by the employer as provided under clause 14 of the letter of award dated 14 November 1994;

(iii) the respondent as a nominated sub-contractor directly negotiated the specifications, contract price and terms of payment for the sub-contract works with the employer beyond the control of the appellant;

(iv) by virtue of the pay when paid clause, the respondent had agreed to share the risk of the employer's insolvency and was obliged to accept the FGB ICULS given by the employer under the said scheme of arrangement to discharge the sub-contract works;

(v) against the factual matrix leading to the genesis of the sub-contracts, the appellant was intended merely as conduit for payment from the employer to the respondent;

(vi) the respondent was estopped by its conduct and/or omissions from denying that the FGB ICULS were accepted as full and final settlement for the sub-contract works;

(b) the learned judge erred in law and in fact in holding that —

(i) the respondent had not agreed to accept the FGB ICULS as discharge of the sub-contract works done without calling viva voce evidence;

(ii) payment as per the pay when paid clause ought to be in monetary terms although the appellant had not received payment in money from the employer;

(iii) the appellant had received 'payment' when the FGB ICULS was a discharge of the main contract payment other than in the form of money;

(iv) it would be a variation of the terms of the sub-contracts if the respondent was obliged to accept the FGB ICULS.

[48] In relation to the application for interlocutory injunction (enclsoure 3), the grounds of appeal, inter alia, are as follows:

(a) the learned judge erred in holding that by virtue of the pay when paid clause, the appellant had to pay the respondent in monetary terms and not in FGB ICULS;

(b) the learned judge erred in law and in fact in failing to consider and hold that there are serious issues to be tried in the appellant's action and/or there was a bona fide dispute as to the alleged debt of RM1,386,646.84;

(c) the learned judge erred in law and in fact in failing to consider and hold that damages would not be an adequate remedy if the respondent were allowed to present and advertise a winding-up petition against the appellant; and

(d) the learned judge erred in fact and in law in failing to consider and hold that the balance of convenience was in favour of granting the interlocutory injunction.

[49] The question to be determined in encl 12 is whether in law and upon a construction of the documents and agreements between the appellant as main contractor and the respondent as the nominated sub-contractor for the said works, the respondent is obliged to accept the form of payment received by the appellant from the employer, which is the FGB ICULS issued pursuant to the said scheme of arrangement instead of cash. The learned judge held that the parties agreed that payment should be in monetary terms and as such the appellant cannot force the

respondent to accept the FGB ICULS. He thus allowed the respondent's motion with costs which resulted in the dismissal of the appellant's suit. Having made that decision, he accordingly dismissed encl 3. Thus the respondent is able to proceed with any winding-up proceedings if it so desire.

JUDGMENT OF THIS COURT

[50] We are of the view that the respondent's application made pursuant to O 14A of the rules would be suitable under the circumstances of this case, viz., the question posed by the respondent in encl 12 was such a question that is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or the matter.

[51] The commentary on O 14A of the rules appearing in the *Malaysian Court Practice* (Practitioner Edition, a publication of the *Malayan Law Journal* at pp 125–126 reads:

> [14A.1.1] Scope of the rule
>
> This order may be invoked by the plaintiff or the defendant in any action, however begun, whether by writ or by originating summons, and whether in respect of the claim, defence or counterclaim and at any stage in the proceedings before and without the full trial of the action.
>
> The scope of this order is to accelerate the final judicial disposal of an action at the interlocutory stage to save the expense and delay which would otherwise arise if the action were to proceed to a full trial. This order empowers the court to make a final determination of a question of law without the need of an application under O 33 r 5 for the determination of a preliminary issue. This order does not limit the powers of the court under O 18 r 19 or any other provision of the rules (see *Korso Finance Establishment Anstalt v John Wedge*, unreported, 15 February 1994, CA Transcript No 94/387).
>
> This order strengthens the powers of the court when dealing with an application for summary judgment under O 14, since in an appropriate case the court is able, instead of granting leave to defend on the basis that the defendant has raised an arguable defence on a question of law, to proceed directly to determine that question and to give summary judgment. And where it appears that the defence raised by the defendant is not merely arguable on the question of law but is a good and complete defence, the court is able to determine that question, and to dismiss the action.

[52] On the requirements of O 14A, the commentary read as follows (p 126):

> [14A.1.2] Requirements of Order 14A
>
> The requirements under this order are the following:
>
> (a) the question of law or construction is suitable for determination without the full trial of the action: r 1(1)(a);
>
> (b) such determination will be final as to the entire cause or matter or any claim or issue therein: r.1(1)(b); and
>
> (c) the parties have had an opportunity of being heard on the question: r 1(3).

In *Kerajaan Negeri Terengganu v Petroliam Nasional Bhd & Anor* [2003] 1 MLJ 260 Arifin Zakaria J (as he then was) said (at p 267):

> It should of course be noted that under O 14A r 1(2) of the RHC, the court has a wide discretion. It may upon determination of the question of law or construction dismiss the action or make such order or judgment as it thinks just. Thus, the action may be disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action.

[53] In relation to suitability of the question of law or construction, the commentary (at pp 126–127) read as follows:

> [14A.1.3.] Suitable question of law or construction
>
> The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see *Manganmal Jhamatmal Lalwani v NE Vickerama* [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue estoppel).
>
> In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under Order 14A rather than to allow it to go for trial. See *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at p 521, CA (construction of letter of credit). For the law as to construction, see *Prenn v Simmonds* [1971] 3 All ER 237.
>
> ...
>
> The question of law or construction to be determined by the court under this order should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity or fictitious facts, about what is the question that has to be determined: *Allen v Gulf Oil Refining Ltd* [1979] 3 All ER 1008, CA (interpretation of statute), reversed on another point [1981] AC 101, [1981] 1 All ER 353. There must be no hypothetical or future facts: *Sumner v William Henderson & Sons Ltd* [1963] 2 All ER 712, CA (no facts were agreed and what the outcome of the evidence was was most uncertain). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal rulings in vacuo or on a hypothetical ruling, which the court will not do (see *State Bank of India v Marjani Markeing*, 1 March 1991, CA Transcript No 9/0304).
>
> The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence. If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O 14A is inappropriate. The court should not be required to interpret the statement of claim to decide what point of law arises. An application under O 14A is to decide clear points of law or construction apparent on the pleadings (see *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* [1998] EWCA 3245, 22 July 1998, CA).

[54] As to the final judgment or order the commentary (at p 128) read as follows: **A**

> [14A.2.4] Final judgment or order
>
> Upon making its determination of the question of law or construction, the court may dismiss the action or make such order or judgment as it thinks just: r 1(2) (cf O 33 r 5). In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action. **B**

[55] In the instant appeal, it is the appellant's case that the respondent has to accept the 1,386,646 FGB ICULS as full and final settlement of the appellant's debt. On the other hand, the respondent maintains that such payments must be made in the form of cash as how the previous forms of payments to the respondent has always been. It is the respondent's case that it is under no obligation to accept payment in the form of the FGB ICULS, even if the appellant themselves had elected to accept the same from the employer. **C** **D**

[56] The appellant's counsel contended that the learned judge failed to consider that the issue in dispute between the parties cannot be determined solely by construing the documents without viva voce evidence and that he ought to have held that the case is not suitable for disposal under O 14A of the rules. He submitted that the issue as to whether the respondent had agreed to accept the FGB ICULS at the various meeting and discussion referred to in the various letters can only be determined at a trial. **E**

[57] We would agree with the contention of counsel for the respondent that the determination of the question or issue of whether the respondent is obliged to accept the FGB ICULS instead of monies as full and final settlement of the appellant's debt will finally determine all the issues in the appellant's suit and that the determination of this question or issue may be justly, expeditiously and conveniently reached by an examination and construction of documents and agreements between the parties without the need for a full trial. **F** **G**

[58] We noted that the pay when paid clause require that payments to the respondent by the appellant is to be made 'within forty five [45] days from the date of receipt by the contractor of any certificate or duplicate copy thereof from the Architect or until receipt of Main contract payment from the Employer, whichever is later'. The appellant has admitted that it received 'payment' under the main contract from the employer in December 2000, through the said scheme of arrangement in the form of FGB ICULS. **H**

[59] The following facts are not disputed: **I**

(a) as a result of the said scheme of arrangement, Faber Group Berhad purchased the employer's debts from the creditors to be satisfied by the issuance of the FGB ICULS;

(b) the appellant, as creditor of the employer, accepted the FGB ICULS in full and final settlement and discharge of the debt owing by the employer to the appellant for the main contract which included the 1,386,646 FGB ICULS in respect of the sub-contract works carried out by the respondent;

(c) the respondent was not a party to the said scheme of arrangement, viz, it was not a creditor of the employer;

(d) the appellant had earlier by letter dated 17 November 1999, reproduced above, informed, inter alia, the respondent about the said scheme of arrangement and propose therein that it will settle any moneys payable to the respondent 'in a similar form, manner and proportion as the moneys payable to us are settled under the said Composite Scheme of Arrangement'; the appellant requested therein that the respondent give their comments to the proposal by 20 November 1999 failing which they will proceed accordingly on the basis that the respondent is agreeable to same;

(e) the respondent replied by letter dated 19 November 1999 to inform that they were unable to accept the settlement proposal as stipulated in the appellant's letter dated 17 November 1999;

(f) by letter dated 11 December 2000 the appellant informed the respondent that the ICULS will be issued shortly in settlement of the moneys owing to them and, to enable them to transfer 219,425 ICULS in full and final settlement of the additional sub-contract in relation to kitchen equipment, they requested the respondent's CDS account number by 21 December 2000 failing which they will hold it on trust for the respondent in their CDS account;

(g) by letter dated 16 December 2000 the respondent informed the appellant that they were unable to consider the settlement proposal 'without knowing the number of ICULS that you propose to transfer and the basis of such number' and requested for further information including 'the Final Certificates in respect of the sub-contracts entered into between the parties';

(h) in December 2000, the appellant received 'payment' under the main contract from the employer vide the said scheme of arrangement in the form of FGB ICULS;

(i) on 30 December 2000 the appellant issued the said debit notes to the respondent amounting to a total of RM1,386,646.84 in the form of FGB ICULS held on the respondent's behalf as full settlement of the sub-contracts;

(j) by letter dated 17 December 2002 the respondent served the notice pursuant to s 218 of the Act on the basis that the appellant owed them a sum of RM1,386,646.84 which remained outstanding under the sub-contracts;

(k) the respondent had earlier received part-payment in the form of cash and is now seeking to only recover the balance of the debt; the moneys owing is evidenced by the said debit notes and the total amount owing is the sum of RM1,386,646.84.

[60] Counsel for the appellant argued that the respondent is 'obliged' to accept the FGB ICULS as payment in kind. In response, counsel for the respondent pointed out

that the respondent does not dispute that the appellant had been paid in FGB ICULS. However, the respondent submitted that it need not accept the same as payment for work done based on the main contract for the following reasons:

(a) in relation to the assertion made by the appellant that the respondent agreed to accept payment in the form of the FGB ICULS, silence on the part of the respondent does not translate into acceptance as various settled authorities and cases have decided;

(b) there was no privity of contract between the respondent and the employer, and the contract to vary the terms was strictly only between the employer and the appellant.

[61] The pay when paid clause (clause 10) reads:

> You have agreed that payments will be made to you within Forty Five [45] days from the date of the receipt by the contractor of any certificate of duplicate copy thereof from the Architect or until receipt of main contract payment from the Employer, whichever is later.

From our reading, the words 'receipt of main contract payment' must be given its normal meaning. In our view, these words simply mean receipt of money and definitely not receipt in kind. The facts showed that the respondent never made any overt or implied gesture to accept payment in kind by way of FGB ICULS. Their letters to the appellant dated 19 November 1999 and 16 December 2000, reproduced above, were neither acts of acceptance nor communication of acceptance but were express rejections of a proposed payment in kind.

[62] Even if the respondent had not responded to the appellant's letters dated 17 November 1999 and 11 December 2000, silence on their part would not constitute acceptance. In relation to this, we would refer to *Halsbury's Laws of England* (4th Ed) Vol 9 at p 123 which reads:

> 250. Mode of acceptance: (2) by silence.
>
> Where the offeree is silent following the offer of a bilateral contract, a distinction must be drawn between the act of acceptance and communication of acceptance. It is not always necessary that acceptance be communicated before it becomes effective, but there must be an act of acceptance.
>
> The general rule is that if the only facts are that there has been an offer followed by silence on the part of the offeree, there is no acceptance of that offer, though there might be liability to pay a reasonable sum for any benefit received. Thus, the offeror cannot bind the offeree against the latter's will by expressly stipulating that, if the offeree does nothing, he will be bound to a contract, or to a variation of an existing contract.

[63] On the true construction of the pay when paid clause, we do not think that the appellant can insist upon paying the outstanding sum it owed to the respondent by way of the FGB ICULS. The pay when paid clause is straightforward and unambiguous. Payments due to the respondent for works done has to be made in cash and not otherwise unless agreed thereto. The evidence clearly showed that the respondent had at the outset refused to accept the payment in the form of the FGB ICULS.

[64] We cannot fathom the appellant's argument that the learned judge was wrong in failing to consider and hold that respondent was estopped by its conduct from denying that it had accepted the FGB ICULS when the evidence clearly showed otherwise. We further cannot see how it can be argued that the appellant would suffer great prejudice and detriment if the respondent is now allowed to deny acceptance of the FGB ICULS when the evidence clearly showed that the respondent has refused at the outset to accept payment by kind in that form.

[65] The FGB ICULS were deposited into the appellant's CDS account upon issuance and they were in a position to sell the same upon its listing. The appellant pointed out that the FGB ICULS had fallen substantially in value since they were issued and now contend that they were deprived of the opportunity to sell the same which they would have done if not for the respondent's conduct. With due respect to the appellant, we wonder whether they would have played the same tune if the FGB ICULS had been traded way above its issue price upon listing.

[66] Counsel for the appellant referred to several authorities including *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694 and *Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd* [1988] 1 MLJ 500 and *Hudson's Building and Engineering Contracts* (11th Ed) Vol 2 by IN Duncan Wallace. We have perused the authorities and found that the issues litigated or discussed therein were different, viz., it relates to entitlement to progress payments between the main contractor and the sub-contractor where no payments were received from the employer and did not deal with payment in kind. In the instant appeal, the appellant agreed to accept payment from the employer in the form of FGB ICULS. Hence, there was already receipt of payment by the appellant from the employer. It should have been in the form of moneys but the appellant agreed to accept in kind instead as satisfaction of the moneys due and owing to them by the employer. It was not a case where a contractor has not been paid by an employer. The respondent was clearly not a party to the said scheme of arrangement and hence was in turn under no obligation to receive the FGB ICULS in place of monies. The material words in the pay when paid clause are receipt of payment. We must give those words their normal meaning. The prima facie meaning of receipt of payment is receipt of money. We agree with the learned judge that the appellant in turn was obliged to make monetary payment to the respondent for the debt owing.

[67] In relation to encl 3, the appellant has not illustrated that the institution by the respondent of proceedings for the winding-up of the appellant would be an abuse of the process of the court. The fact that damage may be caused to a company is not per se a ground to prevent a bona fide petitioner from advertising the petition as required by the Winding Up Rules (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447. A company, upon being served with a petition, should defend the petition proper at the hearing of the petition.

[68] For the reasons aforesaid we are of the unanimous view that there are no merits in the appeals against both enclosures 3 and 12 and hence we dismissed the appeals with costs. The deposit is to the account of taxed costs.

Appeal dismissed.

Reported by Sally Kee